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IN THE

Supreme Court of the United States

October Term, 1969
No. 473

LYN-BEV DEVELOPMENT, INC.,
Petitioner,

vs.

COMMERCIAL NATIONAL BANK, etc., *et al.,*
Respondents.

Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, of the State of California.

TYLER ABELL,
1225 19th Street, N.W.,
Washington, D.C. 20036,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

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Petition for Writ of Certiorari to the Court of Appeal, Fourth Appellate District, of the State of California.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal, 4th Appellate District, of the State of California, entered in the above-entitled case on March 21, 1969, and modified on April 9, 1969 at which time a Petition for Rehearing was denied. A Petition for Hearing in the Supreme Court of the State of California was denied, without hearing, on May 14, 1969.

Opinion Below.

The opinion of the Court of Appeal, 4th Appellate District, Division Two, State of California, was certified for non-publication and hence was unpublished as was the denial of the Petitions for Rehearing in said Court and the Supreme Court of California.

Jurisdiction.

The Judgment of the Court of Appeal, 4th Appellate District, State of California, was made and entered on March 21, 1969. A petition for rehearing was denied on April 9, 1969, at which time the opinion was modified. This opinion, as modified, became final on May 14, 1969, when the Supreme Court of the State of California summarily denied a Petition for Hearing. A copy of the March 21, 1969 opinion, the modification of opinion of the Court of Appeal, and of the denial of hearing of the California Supreme Court are appended to this Petition, as Appendices A, B and C, respectively. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3). (See *Sniadach v. Family Finance Corp. of Bay View,* .... U.S. ...., 89 S. Ct. 1820 (1969).

Question Presented.

Was appellant denied the use of and title to its property without due process of law.

(1) On February 3, 1967, petitioner filed a lawsuit in the Orange County Superior Court and at that time obtained an *ex parte* temporary restraining order and order to show cause *re* preliminary injunction, both prohibiting respondents below from completing a trustee's sale on petitioner's sole asset.

(2) The order to show cause was called for hearing February 24, 1967 at 10:30 A.M. At about 11:15 A.M. all parties were *excused* by the Court from further attendance until the afternoon session of Court. Inasmuch as petitioner's counsel was scheduled to sit as judge *pro tempore* in another court to impose sentence in a criminal matter at 1:30 P.M., the Court had ordered

the matter to be heard "when all counsel could be present".

(3) At 1:50 P.M., the Court, apparently forgetting that it had continued the matter until "all counsel could be present", called the matter in the absence of petitioner or its counsel, dissolved the temporary restraining order and denied the requested preliminary injunction, thereby permitting respondents below to proceed with the previously restrained trustee's sale. This not only deprived petitioner of title to its property but also thereby its right to avail itself, its creditors, and its shareholders of the benefits of the Bankruptcy Act of 1938, as amended.[1] (11 U.S.C. § 1).

Statutes Involved.

The pertinent statutes involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States; Article I, Section 13 of the Constitution of the State of California; and Section 527 of the California Code of Civil Procedure, which are set forth in Appendices D, E and F respectively.

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[1]While the Bankruptcy Act gives the referee in bankruptcy power to resolve adverse claims to real property by means of summary proceedings, *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), this power may only be invoked when the property in question is in the possession of the bankrupt or the bankrupt is in title. *Kapelus v. Franklin*, 377 F. 2d 815 (1967) Petitioner's referee (case no. 14538-R, U.S. District Court, Central District of California) held that he had no jurisdiction to set aside the trustee's sale since he found that no one was in possession of the unimproved land involved herein and that petitioner was not the record owner. Thus he could not approve an offer to purchase the land at a price of $330,000.00, $136,000.00 in excess of the amount paid at the trustee's sale. This $136,000.00 would have paid all unsecured creditors and would have given the shareholder a small return on his investment.